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November 7, 2005

**VIA MESSENGER AND ELECTRONIC MAIL**

John Minan, Chairman  
Regional Water Quality Control Board, Region 9  
9174 Sky Park Circle, Suite 100  
San Diego, CA 92123

John Robertus, Executive Officer  
Regional Water Quality Control Board, Region 9  
9174 Sky Park Circle, Suite 100  
San Diego, CA 92123

Dear Messrs. Minan and Robertus:

*Tentative Cleanup and Abatement Order No. R9-2005-0126*  
Comments on Order of Proceedings Dated October 18, 2005

The City of San Diego submits the following comments on Paragraph 3 of the Order of Proceedings dated October 18, 2005.

**Phase II**

As the City understands these proceedings, the Cleanup Team will be issuing a revised tentative Cleanup and Abatement Order that will serve as the template for the Board's final decision. The Board, in turn, to meet its legal obligations will have to make findings – "the relevant sub-conclusions that bridge the analytic gap between the ultimate decision and the raw evidence." See, e.g., Topanga Assn. v. County of Los Angeles 11 Cal.3d 506 (1974). To ensure that the parties have a full and fair opportunity to respond to the allegations in the tentative Cleanup and Abatement Order, the technical report should also contain the findings the Cleanup Team will be asking the Board to make, or reference those findings already listed in the tentative Cleanup and Abatement Order to which the technical information applies. This ensures that all designated parties have a full and fair opportunity to address the merits of the tentative order.

John Minan, Chairman  
John Robertus, Executive  
Officer

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### **Phase III Submissions**

In general, the City believes that Paragraph 3 of the Order of Proceedings as distributed on October 18, 2005 contains a viable procedural framework for addressing the tentative Cleanup and Abatement Order; however, the City remains concerned that there may be inadequate time in Phase III to address all matters that will be raised in the yet-to-be-released Technical Report. The City cannot determine the amount of work that will be necessary to respond to the Technical Report until we have had the opportunity to read it. With that in mind, the City suggests one of the following modifications to the Order:

- The time set in the October 18, 2005 Order will be considered tentative, with the final date for Phase III submissions to be determined in a subsequent pre-hearing conference; or
- The final Order should contain a deadline for submitting motions to extend the time for Phase III submissions, and specify that such motions will be granted upon a showing of good cause – a standard that will be low and liberally construed in favor of granting an extension to ensure that due process rights are protected.

### **Phases IV, V, and VI**

The only concern the City has with respect to Phases IV, V and VI is that, similar to Phase III, it is impossible to divine the amount of work necessary to rebut all issues raised in the Phase III submissions when those documents do not yet exist. The City believes that Phase IV could benefit from a subsequent pre-hearing conference to discuss the amount of time that will be necessary to submit rebuttals. A motion procedure probably would not work with only a 30-day deadline, but the Order may be amended to make a motion procedure feasible.

Otherwise, Phases IV, V, and VI strike the appropriate balance in ensuring fairness to all designated parties. In particular, the City opposes the changes proposed by the Cleanup Team in their comments dated November 3<sup>rd</sup>, which would allow the Cleanup Team to submit rebuttal evidence after all other designated parties have completed their submissions. As issued on October 18, 2005, the Order of Proceedings limits the submission of evidence at the Phase VII hearing. If the Cleanup Team does not submit its rebuttal evidence until after all other designated parties, due process will require the other designated parties have an opportunity to submit additional evidence at the hearing – this is what makes the standard law-and-motion process in trial courts fair because even though the moving party gets the last opportunity to submit evidence with a brief, any party may submit evidence at the hearing. In short, administrative convenience is not a policy that overrides due process; if the Cleanup Team will be allowed to submit evidence after all other designated parties but before the hearing, then all other parties must be able to submit evidence at the Phase VII hearing. The City suggests leaving the Phases IV – VI as is, and allow the submission of evidence after Phase IV to occur only in the sound discretion of the Board, tempered by the mandates of due process.

John Minan, Chairman  
John Robertus, Executive  
Officer

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### Conclusion

Except for procedures to allow designated parties to obtain time extensions to ensure complete and accurate submissions during Phases III and IV, the procedures contained in the Order of Proceedings balances well the competing interests of due process with attention to lingering environmental problems.

Best Regards

MICHAEL J. AGUIRRE, City Attorney

By

  
Timothy J. Miller  
Deputy City Attorney

TJM:TJM

cc: Cleanup and Abatement Order Service List (attached)  
Scott Tulloch, Director, Metropolitan Waste Water Department  
Chris Zirkle, Deputy Director, Storm Water Pollution Prevention